

NO. 83038-0

SUPREME COURT  
OF THE STATE OF WASHINGTON

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BRENDA L. SMITH, Deceased, and on behalf of JERRY D. SMITH,  
RICHONA HILL, JEREMIAH HILL, and the ESTATE OF BRENDA L.  
SMITH,

Appellants,

v.

ORTHOPEDICS INTERNATIONAL LIMITED, PS; and PAUL  
SCHWAEGLER, MD,

Respondents.

**APPELLANT'S REPLY BRIEF TO AMICUS CURIAE  
WASHINGTON STATE HOSPITAL ASSOCIATION,  
MULTICARE HEALTH SYSTEM, GROUP HEALTH  
COOPERATIVE AND PHYSICIANS INSURANCE, A  
MUTUAL COMPANY AND AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE  
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## **TABLE OF CONTENTS**

Table Of Contents.....	1
Table Of Authorities.....	3
I.     Reply To Amicus Curiae Of Washington State Hospital Association, Multicare Health System, Group Health Cooperative And Physicians Insurance, A Mutual Company....	5
A.     Amicus Mischaracterize Appellant's Position .....	5
B. <i>Loudon's</i> Bright Line Rule Protects The Rights Of All Personal Injury Plaintiffs.....	6
C.     Reversal of the Court of Appeals Smith Decision Would Not Prevent Legitimate Testimony of a Treating Physician.....	7
D. <i>Loudon</i> Does Not Impair Legitimate Peer Review .....	9
E. <i>Loudon</i> Does Not Impair A Non-Party Treating Physician's Right To Or Ability To Consult With Independent Counsel .....	11
F.     Any Alleged HIPAA Issues Do Not Impact The Smith Appeal And, To The Extent HIPAA Issues May Exist, They Can Be Resolved At A Later Time .....	13
G.     Interjection Of The <i>Jacobus</i> Case Is Irrelevant To The Facts In <i>Smith</i> .....	14
H.     Conclusion.....	15
II.    Reply To Amicus Curiae Of Washington State Association For Justice Foundation .....	15
A.     WSAJF Recommendations Regarding A Presumption of Prejudice Upon the Finding of a <i>Loudon</i> Violation .....	16
B.     The Applicability of RCW 70.02.005(3) et seq. ....	17

<b>C.</b>	<b>Conclusion .....</b>	<b>18</b>
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## TABLE OF AUTHORITIES

### TABLE OF CASES

Loudon v. Mhyre, 110 Wa. 2d 675, 756 P.2d 138, (1988);

Ford v. Chaplin, 61 Wn.App. 896, 812 P.2d 532 review denied, 117 Wn. 2d 1026 (1991);

Smith v. Orthopedics International Ltd. P.S., 149 Wn. App. 337, 203 P. 3d. 1066, review granted 166 Wa. 2d 1024 (2009);

Holbrook v. Weyerhaeuser Company, 118 Wn.2d 306, 822 P.2d 271 (1992);

Rowe v. Vaagen Bros. Lumber Inc., 100 Wn. App. 268, 996, P2d 1103 (2000);

Peters v. Ballard, 58 Wn. App. 921, 795 P. 2d 1158 (1990);

Ford v. Chaplin, Supra;

Carson v. Fine, 123 Wn. 2d 306, 234, 867, P. 2d 610 (1994);

Jacobus v. Crouse a Division I case (No. 63346-5-1);

### STATUTES

RCW 51.52.063;

RCW 4.24.240;

RCW 4.24.250;

RCW 4.24.240(1);

RCW 4.24.250(2);

RCW 70.02.005(3);

### REGULATIONS AND RULES

CR 26(b)(5);

CR 26(b)(4)(B);

CR 26(b)(5)(B);

OTHER AUTHORITIES

Health Insurance Portability and Accountability Act, 29 USC §1181et seq.

I. REPLY TO AMICUS CURIAE OF WASHINGTON STATE HOSPITAL ASSOCIATION, MULTICARE HEALTH SYSTEM, GROUP HEALTH COOPERATIVE AND PHYSICIANS INSURANCE, A MUTUAL COMPANY

A. AMICUS MISCHARACTERIZE APPELLANT'S POSITION

Amicus Washington State Hospital, Multicare Health System, Group Health Cooperative and Physicians Insurance, A Mutual Company [hereinafter WSHA] consistently mischaracterize Smith's arguments as an "extension" or "expansion" of Loudon v. Mhyre, 110 Wa. 2d 675, 756 P.2d 138, (1988). See Amicus Brief Pages 3, 4, 5, 7, and 11. Smith seeks clarification from this Court that the Loudon court's unambiguous prohibition of any contact between defense counsel and plaintiff's treating physician also specifically prohibits ex-parte contact through a third person. Such a holding is especially required in the present case where the ex-parte contact with Dr. Johansson was clearly intended to expand an otherwise treating physician's testimony to that of a CR 26(b)(5) expert witness.

Absent a specific continued recognition that the Loudon principles apply throughout the litigation spectrum, the allowance of defense counsel to have ex-party contact with treating physicians is a fundamental change in all personal injury litigation. In the twenty-two years since the Loudon decision, there has been no change in underlying public policy nor a rash

of Loudon related litigation. Continued recognition of Loudon in the present case will prevent the utilization of third parties to circumvent the direct holding of Loudon under the guise of “lawyers being lawyers”.

**B. LOUDON’S BRIGHT LINE RULE PROTECTS THE RIGHTS OF ALL PERSONAL INJURY PLAINTIFFS**

While Loudon arose in a medical negligence/wrongful death action, its holding applies to all personal injury litigation.<sup>1</sup> Appellant Smith respectfully submits that enhanced restrictions on defense counsel ex-parte contact with treating physicians in Labor and Industries actions is continued recognition of the Loudon principles and underlying public policy.

Since the Loudon decision, there have only been three appellant cases involving Loudon: Ford v. Chaplin, 61 Wn.App. 896, 812 P.2d 532 review denied, 117 Wn. 2d 1026 (1991), Rowe v. Vaagan Bros. Lumber, Inc., supra, and Smith v. Orthopedics International Ltd, P.S., 149 Wn. App. 337, 203 P. 3d. 1066, review granted 166 Wa. 2d 1024 (2009). For the past twenty-two years, the Loudon rule has been unambiguous, fair in

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<sup>1</sup> Loudon does not apply to no-fault Labor and Industry claims. Holbrook v. Weyerhaeuser Company, 118 Wn.2d 306, 822 P.2d 271 (1992) However, the Labor and Industries exception does not supersede Loudon when applicable, See Rowe v. Vaagen Bros. Lumber Inc., 100 Wn. App. 268, 996, P2d 1103 (2000). Further, recent legislative changes have further restricted the timing and the circumstances of ex-parte contact in the Labor and Industries setting. See RCW 51.52.063.

its application and remarkably free from litigation. Upholding Division I's holding in Smith would expose all treating physicians of personal injury plaintiffs to unilateral ex-parte contact by defense counsel without the protective presence of the patient's attorney.

C. REVERSAL OF THE COURT OF APPEALS SMITH DECISION WOULD NOT PREVENT LEGITIMATE TESTIMONY OF A TREATING PHYSICIAN

Amicus WSHA contends that a decision by this Court that defense may not have ex-parte contact with a treating physician through a third party will detrimentally impact the trial testimony of a treating physician. This argument is misplaced. By its very nature, the treating physician's testimony involves factual matters within the witnesses' knowledge base as a treating physician. When testifying based upon knowledge and opinion derived solely from factual observations, a subsequent treating physician does not qualify as an "expert" for purposes of CR 26(b)(4)(B).<sup>2</sup> Peters v. Ballard, 58 Wn. App. 921, 795 P. 2d 1158 (1990). In the present case, Dr. Johansson was never a party and was never identified by plaintiff or defense as a CR 26(b)(5)(B) expert witness. This undisputed and important procedural fact is ignored by amicus. Had Orthopedics

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<sup>2</sup> Now CR 26(b)(5)(B).

International identified Dr. Johansson as a CR 26 (b)(5)(B) expert witness<sup>3</sup> then plaintiff Smith would have had an opportunity to file a motion in limine or had an opportunity to depose Dr. Johansson regarding his expert testimony which, as a result of ex-parte contact, went well beyond the testimonial bounds of a true treating physician. Orthopedics International identified Dr. Samer Saiedy as its CR 26(b)(5)(B) vascular surgery expert. (RP 11/14/07 pages 37-38). Dr. Saiedy never appeared to testify nor was his testimony perpetuated.

In the present case, defense counsel's ex-parte contact with Dr. Johansson through his personal attorney was a calculated circumvention of Loudon in order to provide Dr. Johansson with additional factual and opinion information never before known to or considered by Dr. Johansson during his care and treatment of Brenda Smith. The ex-parte contact provided litigation information so that Dr. Johansson would offer opinions regarding negligence and medical causation. The fact that Dr. Johansson participated in a discovery deposition in his capacity as treating physician does not mandate any differing results. Even with a CR 26(b)(5)(B) expert witness, a party does not waive the protection of civil rules limiting expert witness testimony at trial by allowing the expert to

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<sup>3</sup> A treating physician may be a witness for the defense. See Ford v. Chaplin, Supra. Nevertheless, the Court of Appeals held the trial court erred in allowing ex-parte contact.

answer expert witness questions at deposition. See Peters v. Ballard,  
supra.

As Justice Charles Johnson noted in his dissent in Carson v. Fine,  
123 Wn. 2d 206, 234, 867, P. 2d 610 (1994),

“Such testimony [testimony from treating physician that there is no malpractice] can wreak havoc with a plaintiff’s case and possibly sound its death knell. The prejudicial impact of a treating physician’s adverse expert testimony almost always outweighs the probative value of the testimony.”

Orthopedics International was apparently dissatisfied with the potential testimony of their identified CR 26(b)(5)(B) expert. Orthopedics International needed Dr. Johansson to testify beyond his limitations as a treating physician. Avoiding the direct prohibition of Loudon, defense counsel forwarded to Dr. Johansson, through his personal counsel, plaintiff’s trial brief, trial testimony of plaintiff’s vascular surgery expert and an outline of his direct testimony. Dr. Johansson’s tainted CR 26(b)(5)(B) expert testimony can hardly be equated to amicus WSHA argument that reversal of Smith would be “an unwarranted barrier to the efficient effective presentation of highly probative evidence.” Amicus brief page 4.

**D. LOUDON DOES NOT IMPAIR LEGITIMATE PEER REVIEW**

Washington's peer review statutes RCW 4.24.240 and RCW 4.24.250 substantially predated Loudon and have retained their viability in all respects since the Loudon decision in 1988. RCW 4.24.240 provides immunity from any civil action for damages arising out of a physician's participation in or supplying information or testimony to any professional review committee. RCW 4.24.250 also provides that a health care provider's sharing of information or providing testimony in good faith against another healthcare provider before a regularly constituted review committee or board of a professional society or hospital whose duty is to evaluate the competency and qualifications of members of a profession is immune from civil action for damages. RCW 4.24.240(1). Further, RCW 4.24.250(2) provides that any physician provided information or testimony shall not be subject to the discovery process and must remain confidential.

This statutory peer review process exists independently and separate from any civil action for medical negligence. The confidentiality of any healthcare providers testimony or sharing of information effectively insulates legitimate peer review from the medical negligence and/or personal injury litigation. Amicus WSHA cannot identify any reported case in this state where Loudon has had any impact, let alone a detrimental impact upon legitimate peer review. Loudon prohibits any ex-parte contact by the litigation defense counsel. Loudon does not limit or

prohibit a physician's participation in the statutorily mandated peer review. Legitimate peer review is intended to focus upon the facts of patient care for the intended purpose of improving patient safety rather than being part of calculated effort to improve the institution's defense in any subsequent litigation.

Loudon has never interfered or compromised any peer review process under RCW 4.24.240 and RCW 2.24.250. The continued prohibition of defense counsel having ex-parte contact with a treating physician will not create any legal impediment to Washington's peer review system.<sup>4</sup> It should be anticipated and expected that a hospital and medical institution counsel involvement in peer review matters would be separate and distinct from defense counsel in any medical negligence action, since peer review facts and information are both confidential and not subject to discovery. See RCW 4.24.250

E. **LOUDON DOES NOT IMPAIR A NON-PARTY TREATING PHYSICIAN'S RIGHT TO OR ABILITY TO CONSULT WITH INDEPENDENT COUNSEL**

Amicus WSHA erroneously argues that "[p]etitioner's proposed rule would unduly interfere with healthcare providers' ability to obtain the

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<sup>4</sup> If litigation defense counsel were also allowed to participate in hospital peer review, then the potential for abuse from a defense perspective exists because of the defense counsel's knowledge of peer review facts and information, which are not be subject to discovery and where confidentially, must be maintained.

advice of counsel.” Amicus brief page 17. Dr. Johansson had independent counsel at the time of his deposition and continued to have independent representation through trial. Dr. Johansson chose not to have any ex-parte contact with Brenda Smith’s counsel at any time – which is his prerogative. Reversal of Division I in this case would not impair a treating physician’s right to independent counsel or prevent the subsequent treating physician from seeking independent counsel. Instead, utilization of independent counsel should prevent defense litigation counsel from having indirect ex-parte contact with a treating physician. Appellant Smith respectfully submits that having independent counsel protects a treating physician from efforts of litigation defense counsel to expand the treating physician’s testimony.

Appellant Smith respectfully submits that the individual interests of a subsequent treating physician are not necessarily identical to and may conflict with a medical institution’s desire to defend institutional negligence claims. However, in the present case there are no competing interests. It is undisputed that Dr. Johansson was never a party. Dr. Johansson is a member of a group of vascular surgeons separate and distinct from Orthopedics International. Dr. Johansson is not an agent or employee of Orthopedics International. There is no factual basis for

amicus WSHA's erroneous beliefs that Loudon would unduly interfere with a healthcare provider's ability to obtain advice of counsel.

**F. ANY ALLEGED HIPAA ISSUES DO NOT IMPACT THE SMITH APPEAL AND, TO THE EXTENT HIPAA ISSUES MAY EXIST, THEY CAN BE RESOLVED AT A LATER TIME.**

Amicus WSHA suggests that the Health Insurance Portability and Accountability Act, 29 USC §1181, et seq. may, under very limited circumstances, permit attorney ex-parte contact with a patient's treating physician. At no point at the trial level, in the Court of Appeals or in this Court have Orthopedics International and Dr. Schwaggler ever argued that their ex-parte contact with Dr. Johansson was permitted by HIPAA. As with peer review, there is no interplay between litigation defense counsel's attempt at ex-parte contact and any alleged need for an institutions' potential right to contact a treating physician under HIPAA. Any such issues must await another day and another time for resolution. It stretches credibility to suggest that HIPAA allows either direct or indirect ex-parte contact by defense counsel with a treating physician during trial years after the negligent care in question.

The WSHA suggestion that HIPAA may somehow, and under scenarios not present in Smith, is essentially a poorly disguised federal preemption argument. Such an issue must be resolved by the interested

parties in such a case, if and when it ever arises and not in this appeal.

Simply put, Loudon and HIPAA have no interrelationship.

**G. INTERJECTION OF THE JACOBUS CASE IS IRRELEVANT TO THE FACTS IN SMITH**

Amicus WSHA presents Jacobus v. Crouse a Division I case (No. 63346-5-1) as legal justification to deny Brenda Smith's requested relief. Jacobus is clearly distinguishable and does not present any legal issues presently before this court.

As mentioned previously, Dr. Johansson is not a partner to or a member of Dr. Schwagglers Orthopedics International Limited, PS. Dr. Johansson is not a member of a multispecialty clinic, which includes Dr. Schwagglers or Orthopedics International. Dr. Johansson had independent counsel at all times. In Jacobus, there apparently was no attempt by defense counsel to influence the testimony of a subsequent treating physician by having ex-parte contact through independent counsel. Subsequent treating physicians at the University of Washington in Jacobus requested and obtained independent counsel. All contacts with both patient and defense counsel were limited to depositions. From the perspective of the subsequent treating physician, application of Loudon worked as intended.

The possibility that Loudon issues may arise in the multi-disciplinary clinic or institutional setting is no justification for this Court to ignore a direct violation of Loudon in the present case. A reversal of Smith will still preserve Jacobus issues for appellate review when such a case is ripe for review.

#### H. CONCLUSION

Other than a general dislike for Loudon, the WSHA amicus brief wishes to indirectly influence the Smith decision by its dissatisfaction of the application of Loudon in a case where discretionary review was denied. A particular institution's dissatisfaction with another firm's proactive utilization of Loudon does not justify the WSHA multi-faceted attack upon Loudon, which is grounded in sound public policy and judicial fairness. Amicus WSHA purports to promote a level playing field in medical negligence litigation. Allowing defense counsel to have ex-parte contact with a treating physician throughout the litigation process, either directly or indirectly, subverts this level playing field and especially in this case where the prohibited ex-parte contact was for the improper purpose of expanding the nature and scope of a treating physician's trial testimony.

#### II. REPLY TO AMICUS CURIAE OF WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

A. WSAJF RECOMMENDATIONS REGARDING A PRESUMPTION OF PREJUDICE UPON THE FINDING OF A LOUDON VIOLATION.

The WSAJF amicus brief sets forth a logical and rational argument for the recognition of a presumption of prejudice for consistency in fashioning a remedy at the trial court level. The affirmation that Loudon is a “bright line” rule together with the presumption of prejudice will substantially reduce and most likely eliminate Loudon violations as is the case in Smith. When a Loudon violation is established, a “bright line” trial practice rule has been broken. The focus of this Court must and should be protection of Loudon, protection of patient’s rights, protection of the litigation process and deterrence for such improper conduct. Ex-parte contact is not always known or discovered. When it does occur, the patient should not bear the burden of establishing prejudice.

This is especially true in the present case where once the fact of ex-parte contact was established, the Smith counsel were denied an opportunity to explore the extent of the ex-parte contact and its ramifications. First, a request for an evidentiary hearing was denied (RP 11/19/07, p.48). Second, the trial court denied from the Smith’s counsel the right to review emails between defense counsel and Dr. Johansson’s personal counsel Id. Third, the trial court refused to identify, during trial, the unidentified material forwarded to Dr. Johansson’s counsel — later

identified as the outline for Dr. Johansson's direct examination, which included issues and opinions beyond Dr. Johansson's involvement in Brenda Smith's care.

In the present case, the trial court found no Loudon violation. Hence, there was no evidentiary hearing. The trial court was concerned of defense counsel's lack of candor (RP 11/19/07 pp 61-63) and the surprise testimony of Dr. Johansson and offered an opportunity to cross-examine Dr. Johansson in front of the jury. The allowance of an opportunity to cross-examine should never be considered under these facts to be an appropriate remedy because it was fashioned as a remedy to lack of candor and surprise – not the Loudon violation. Not allowing plaintiff Smith's counsel the knowledge of or access to emails and the testimony outline, for in court cross-examination of is of dubious value. In the present case, the limited trial record regarding prejudice results from the court's refusal to allow an evidentiary hearing. Therefore, the better course of action for this Court is to recognize a presumption of prejudice with additional remedies available to the trial court given the circumstances of an individual case.

**B. THE APPLICABILITY OF RCW 70.02.005(3) ET SEQ.**

WSAJF have appropriately identifies RCW 70.02.005(3) as reflected both the legislative and public policy underpinnings of Loudon.

This provision provides:

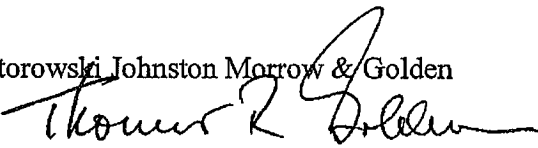
“(3) in order to retain the full trust and confidence of patients, healthcare providers have an interest in the sharing that healthcare information is not improperly disclosed and in having clear and certain rules for the disclosure for healthcare information.”

This legislative intent and purpose supports a bright line Loudon rule prohibiting any direct or indirect ex-parte contact between defense counsel and a treating physician. Such a bright line rule also warrants a known penalty for any such violation.

C. CONCLUSION

Clarification of Loudon that any defense counsel ex-parte contact with a treating physician, either direct or indirect, with known ramifications is in furtherance of public policy, legislative policy and basic principles of justice. WSAJF furthers these principles while amicus WSHA advocates a manifest change in trial practice for all types of personal injury litigation.

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### CERTIFICATE OF SERVICE

I certify that on the 14<sup>th</sup> day of June 2010, I caused a true and correct copy of the foregoing document to be served on the following counsel of record via email:

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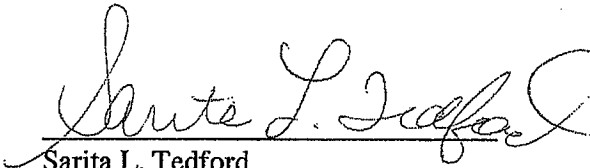
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